



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 25, 1992

Mr. Charles Karakashian, Jr.  
Assistant General Counsel  
Texas Department of Public Safety  
P. O. Box 4087  
Austin, Texas 78773-0001

OR93-038

Dear Mr. Karakashian:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 16129.

The Texas Department of Public Safety (the department) received from an attorney an open records request for a videotape recording of the arrest of his client for allegedly driving while intoxicated. You have submitted to this office as responsive to the request two videotapes, one an "enhanced version" of the other. Although all criminal charges in connection with the arrest have been dismissed, you contend that the requested videotapes may be withheld pursuant to section 3(a)(3) of the Open Records Act. You also contend that videotapes come under the protection of section 3(a)(19).

To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In this instance, you contend that the videotapes relate to reasonably anticipated litigation because the attorney/requestor had previously filed what you characterize as a notice of claim with regard to the arrest and subsequent events. *See Civ. Prac. & Rem. Code* § 101.101 *et seq.* Importantly, however, while the October 11, 1991 letter to which

you refer makes reference to "damages" that the requestor's client has suffered, the letter contains no indication that the requestor is considering legal action against the department. In this instance, we do not believe that you have made the requisite showing of concrete evidence of the likelihood of litigation.<sup>1</sup> Accordingly, section 3(a)(3) does not protect the videotapes.

Section 3(a)(19) of the Open Records Act protects:

photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . the release of which would endanger the life or physical safety of the officer unless:

(A) the officer is under indictment or charged with an offense by information; or

(B) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(C) the photograph is introduced as evidence in a judicial proceeding.

V.T.C.S. art. 6252-17a, § 3(a)(19).

The prohibition against the release of peace officers' photographs, or in this instance electronically recorded visual images, is mandatory unless the officer gives his or her written consent to the release or one of the listed exceptions apply. *See* Open Records Decision No. 502 (1988). None of the exceptions listed in section 3(a)(19) apply here. Consequently, unless the peace officers otherwise consent to the release, the department may withhold pursuant to section 3(a)(19) only those portions of the videotapes that contain depictions that tend to identify specific peace officers. The department must, however, release all remaining portions of the videotapes, including the audio.

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<sup>1</sup>We note that the requestor, in a telephone conversation with one of the department's employees, had at one time threatened to bring suit against the department unless he received, within 10 days of the date of his call, a response to his October 11 letter. Because the department responded to the requestor within the deadline, this office does not interpret the requestor's threat as sufficient by itself as grounds for invoking the protection of section 3(a)(3).

We further note that the requestor's client, whose drivers license was suspended for his alleged refusal to submit to an intoxilizer test at the time of his arrest, missed the statutory deadline for filing an appeal of the suspension. *See* V.T.C.S. art. 6701/-5, § 2(f). Consequently, there will be no judicial hearing on this matter on which to base a section 3(a)(3) claim.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-038.

Yours very truly,



Kay Hamilton Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/RWP/lmm

Ref.: ID# 16129  
ID# 16130

Enclosures: Submitted videotapes

cc: Mr. C. N. Rothe  
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(w/o enclosures)